

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LEON TORRES

Claimant

VS.

HIGHLAND PROPERTIES, INC.

d/b/a HIGHLAND BUILDERS

Respondent

AND

UNKNOWN

Insurance Carrier

Docket No. 1,007,308

ORDER

Claimant requests review of the October 16, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) Jon L. Frobish.

ISSUES

The ALJ denied claimant's request for temporary total disability benefits and medical treatment after concluding claimant was an independent contractor rather than an employee.

The claimant requests review of that decision asserting the ALJ erred in finding he was an independent contractor. Rather, claimant contends the evidence supports his claim that he was respondent's employee on the date of his accidental injury.

Respondent and its carrier argue that the greater weight of the evidence supports the ALJ's finding that claimant was an independent contractor under Kansas law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record compiled to date, the Appeals Board (Board) finds the ALJ's preliminary hearing Order should be affirmed.

Highland Builders is a general contracting company located in Coffeyville, Kansas. Highland Builders does both commercial and residential construction, including roofing. It has been in business for over eight years and generally employs between 15 and 20 people at a time, according to Rick Shafer, the owner of Highland Builders.

In May 2002, a hail storm struck Coffeyville causing damage to the roofs of many houses. As a result, Highland Builders received numerous calls for re-roofing work. In addition, respondent hired a salesman to solicit roofing jobs. That salesman also arranged for claimant to come to Coffeyville from his home in Arkansas to help with the roofing work.

Claimant was retained by respondent to do roofing work. Their relationship is evidenced not only by the parties' conduct and Mr. Shafer's testimony at the preliminary hearing, but also by a written contract.¹ According to Mr. Shafer claimant was one of several crews with whom roofing work was subcontracted. All the roofing subcontractors executed an independent contractor agreement in the form shown on respondent's exhibit one. Due to an oversight, claimant did not sign such an agreement initially, but eventually on August 5, 2002, he did sign the independent contractor contract.² The parties' contract indicates their relationship was that of principal/independent contractor. The contract is silent, however, as to providing workers compensation insurance coverage.

There is no dispute that claimant sustained accidental injury arising out of and in the course of his work on July 12, 2002. In addition, there is no dispute that claimant gave respondent notice of his injury. It is only claimant's status, whether he is an employee or a self-employed independent contractor, that is the basis for the preliminary hearing dispute.

According to Mr. Shafer, claimant was paid by the job based upon a verbal agreement negotiated in advance of the job. At the completion of the job, claimant would present Mr. Shafer with a written bill itemizing the work performed based on the number of squares consumed on the roofing job. Respondent would pay claimant deducting no taxes. Respondent and claimant both provided some of the tools necessary to perform the work, but respondent purchased all the materials necessary for the jobs.

¹P.H. Trans. at 21; Resp. Ex. 1.

² P.H. Trans., Resp. Ex. 1.

Although respondent exhibited some control in the quality and aesthetic aspect of the work and was present at the work site on a regular basis, claimant set his own hours, worked at his own pace and generally performed his work without direct supervision. Moreover, claimant hired his own crew, which varied in size from four to eight members. Claimant also determined the amount of compensation he paid to his crew.

After considering all this evidence, the ALJ concluded "the [c]laimant was a self-employed subcontractor and not a worker as defined by the Workers Compensation Act."³

Generally, an independent contractor is someone who contracts to perform a piece of work according to his own methods and without being subject to the control of an employer, except as to the final result.⁴ An employer, however, is someone who employs another to perform services in his affairs and who controls or has the right to control the conduct of the other in performing those services.⁵ Although there are a number of factors to consider when making this decision, particular emphasis is placed on the employer's right to control the worker.⁶

Based upon the evidence contained within the record thus far, it appears that claimant was not respondent's employee on July 12, 2002 when he suffered his injury. Claimant was paid by the job, was essentially unsupervised, set his own working hours and methods and provided most of his own tools. In addition, claimant hired and paid his own crew. Accordingly, the ALJ's preliminary hearing Order should be affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.⁷

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated October 16, 2003, is affirmed.

³ Order (Oct. 16, 2003); See K.S.A. 44-508(b).

⁴ *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984); *Krug v. Sutton*, 189 Kan. 96, 366 P.2d 798 (1961).

⁵ *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104 (1991); *Russell v. H & K Delivery*, Docket No. 192, 809, 1998 WL 462620 (Kan. WCAB July 24, 1998).

⁶ *Hartford Underwriters Ins. Co. v. Kansas Dept. of Human Resources*, 272 Kan. 265, 32 P.3d 1146 (2001).

⁷ K.S.A. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this _____ day of April 2004.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Paul L. Kritz, Attorney for Respondent and Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director